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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re V.T. et al., Persons Coming Under the
Juvenile Court Law.

B260474
(Los Angeles County
Super. Ct. No. CK72533)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Appellant,

v.

ANGEL T.,

Defendant and Appellant.

APPEALS from orders of the Superior Court of Los Angeles County. Akemi D. Arakaki, Judge. Affirmed in part and reversed in part.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Tracey F. Dodds, Deputy County Counsel for Plaintiff and Appellant.

Angel T. (father) appeals from a juvenile court order denying his request that his children, V. T. (V.T., born July 2010) and April T. (April, born Aug. 2011), be placed with him, with the arrangement that they stay with their maternal grandmother while he is incarcerated. In its cross-appeal, the Los Angeles County Department of Children and Family Services (DCFS) challenges the juvenile court's dismissal of the allegation pursuant to Welfare and Institutions Code section 300, subdivision (b),¹ that the children needed the protection of the juvenile court because of father's incarceration.

We agree that the juvenile court erred in its placement order. Placement of the children with father would not be detrimental to them; he can make appropriate arrangements for their care and he was expected to be released from incarceration in November 2015.² Thus, we reverse the juvenile court's placement order.

Because DCFS failed to show that the children were at a substantial risk of serious physical harm as a result of father's incarceration, we affirm the juvenile court's order dismissing the allegations against him.

FACTUAL AND PROCEDURAL BACKGROUND

The Petition and Father's Demurrer

This family consists of father, Amanda L. (mother), V.T., and April. Mother has a history of drug abuse. As a result, DCFS filed a petition pursuant to section 300, subdivision (b), on their behalf. The children were not detained from mother; they were allowed to reside with her in her drug treatment program. At the time, as the petition alleged, father was incarcerated.

On August 15, 2014, both parents appeared in juvenile court for the arraignment and detention hearing. The juvenile court permitted the children to remain in mother's care, and the matter was continued to allow father to file a demurrer to the section 300 petition.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² We attempted but have been unable to confirm whether father was in fact released.

On August 20, 2014, father filed a demurrer to the section 300 petition. He argued that the allegation concerning his incarceration did not state a cause of action under section 300, subdivision (b). Following DCFS's opposition, the juvenile court overruled his demurrer.

Detention Report and First Amended Section 300 Petition

On September 15, 2014, DCFS detained the children. Mother had relapsed and used methamphetamines. Consequently, the children had been placed with their maternal grandmother.

The detention report also detailed father's history of illegal drug possession and criminal background.

On September 19, 2014, DCFS filed a first amended section 300 petition adding an allegation that father had a history of illegal drug possession.

Supplemental Report (Oct. 28, 2014)

DCFS reported that the paternal grandmother felt that the children were safe residing with their maternal grandmother, and she did not believe that they should be removed from her care. She said that she had spoken to her son, who had full confidence in the maternal grandmother's ability to care for the children. The paternal grandmother indicated that she wanted to visit the children more often, but she did not have a bond with them.

Adjudication Hearing

After receiving several reports into evidence, the juvenile court sustained the allegations of the section 300 petition as they pertained to mother. However, the juvenile court dismissed the allegations as to father. Father then requested that the juvenile court place the children in his custody and that his plan would be to leave the children with the maternal grandmother. The juvenile court denied his request, stating: "[Father] is not in a situation where he can receive the children. I understand he may be able to make a plan in [his attorney's] estimation, the plan being to leave them with the maternal grandmother where they already are receiving funding, receiving assistance from [DCFS]. I don't know if [father] has all of that necessarily in place. [¶] The situation is this: He is a

noncustodial, nonoffending father who I agree . . . should be getting family reunification services. Because the plan is hopefully when he gets out of custody, he is going to come back and be part of these kids' lives. Based on what I have in front of me, I don't believe this court can exercise—essentially, in my estimation it would be—it would be essentially putting forth or ordering a legal fiction because I don't believe I can make that order. . . . [¶] . . . [I]n any situation where there is already a plan in place and there is a lot going on and then he goes in custody. This is a situation where he left his kids what he thought was a safe place. He left them with the mom. The mom has now relapsed and going back to the situation that she was in before. Everyone was really hopeful. We were even hopeful when we were here last, and that's not where we are now. [¶] I don't believe that this court can release to home of parent father. I do believe that [father] was a nonoffending, noncustodial parent. I do believe that he should be entitled to reunification services so that he can be continuing to work so that when he is released from custody, he is going to be a nonoffending, noncustodial parent and get the kids when he can. As he is currently situated, I don't believe this court can do that.”

The juvenile court found that substantial danger existed to the children and that there was no reasonable means to protect them without removal from custody. Father was granted reunification services and visitation.

Appeals

Father timely filed his notice of appeal, and DCFS timely filed its notice of cross-appeal.

DISCUSSION

I. Father's Appeal

Father challenges the juvenile court's placement order; he contends that the juvenile court should have placed the children with him according to his plan.

Section 361, subdivision (c)(1), provides that a juvenile court may not take a dependent child from the physical custody of his or her parents unless the juvenile court finds clear and convincing evidence that “[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if

the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." Section 361.2, subdivision (a), provides that "[w]hen a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child." If there is and if that parent requests custody, "the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).) Appellate courts have interpreted these provisions to require juvenile courts to allow nonoffending incarcerated parents to claim or retain custody of children neglected or abused by the other parent, provided they can make appropriate arrangements for the care of the child. (*In re A.A.* (2012) 203 Cal.App.4th 597, 606; *In re V.F.* (2007) 157 Cal.App.4th 962, 965–966, superseded by statute on other grounds as stated in *In re Adrianna P.* (2008) 166 Cal.App.4th 44, 57–58; *In re Isayah C.* (2004) 118 Cal.App.4th 684, 695–701; *In re S.D.* (2002) 99 Cal.App.4th 1068, 1077.)

That is exactly the situation here. As the juvenile court found, father was a nonoffending parent. There is no evidence that placement of the children with father would be detrimental to them. And father could have arranged for care of the children—the maternal grandmother is willing to care for the children and he is agreeable to them remaining with her. Moreover, father is expected to be released from incarceration in November 2015. (*In re V.F.*, *supra*, 157 Cal.App.4th at p. 966.) We will not consider DCFS's speculation that "it is extremely likely that [f]ather's time out of custody will be short lived."

II. DCFS's Cross-appeal

DCFS objects to the juvenile court's order dismissing all allegations against father. It claims that the juvenile court should have sustained the allegation that father was unable to provide for his children as a result of his incarceration.

DCFS's argument fails because there is no evidence that the children were at substantial risk of serious physical harm. (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1395–1396.)

DISPOSITION

The juvenile court's placement order is reversed and remanded with directions that the juvenile court enter a new order placing the children with father pursuant to section 361.2. The juvenile court's order dismissing the allegations against father is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
HOFFSTADT